

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION  
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WILLIAM G. HARRIS,	)	
Appellant,	)	
v.	)	
GENEVIEVE BAUER, Superintendent	)	<u>DECISION AND ORDER</u>
of Schools, Yellowstone County,	)	
Montana, Sitting for Sonja	)	
Spannring, Superintendent of	)	OSPI-15-81
Schools, Park County, State of	)	
Montana and LIVINGSTON SCHOOL	)	
DISTRICTS NO. 1 and 4, Livingston,	)	
Park County, Montana,	)	
Respondents.,	)	

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This is an appeal from the Findings of Fact, Conclusions of Law and Order issued by Genevieve Bauer, Hearing Examiner, sitting for Sonja Spannring, County Superintendent of Schools of Park County. The case was submitted on an agreed statement of facts for resolution by the hearing examiner as a matter of law. The hearing examiner considered the stipulated facts, exhibits and written arguments in rendering her final order.

William G. Harris, Appellant, in January, 1973 applied for the position of school psychologist of the Livingston School District. The School District received conditional authorization to employ Appellant. Appellant began the 1973-74 school year as a school psychologist and continued in that capacity until April 15, 1981 when the Board of Trustees voted to terminate his professional services.

On March 20, 1981, Appellant was notified that his performance as a school psychologist was in question and that there would be problems in renewing his contract for the 1981-82 school year. On April 15, 1981, the Board of Trustees voted unanimously to terminate the services of Appellant as school psychologist.

The County Superintendent found that during Appellant's services to the Livingston School District, he was employed as a school psychologist which did not require the duties or responsibilities of a teacher including teaching within the classroom.

Appellant presents the following issue: Was Appellant, while employed in the school district as a school psychologist, a tenured

teacher eligible to the protections of a tenured teacher in Lhr termination of his employment.

The hearing examiner found that Appellant was hired not in the capacity of an instructional, supervisory or administrative staff as a teacher as defined in Section 20-1-101(20). Rather Appellant was hired in the capacity which has now been defined by the 1981 Montana Legislature as a "Specialist." Further, she found that the Montana Teacher Tenure Act Section 20-4-203, did not apply to Appellant and he was not entitled to tenure. It is from these facts and conclusions that Appellant presents his appeal. This case revolves around the definition and purpose:

- (1) of a teacher for tenure purposes,
- (2) of emergency authorization,
- (3) of teacher certification, and
- (4) of contract law.

#### HISTORY

Certification of a "school psychologist" did not occur until 1981. See Section 20-4-106. Prior to the amendment of this statute, a school psychologist was not recognized for any certification purposes by the Board of Public Education. In order to understand certification of a teacher and its important role in the accreditation of public schools in Montana an examination of the statutes is in order. Section 20-4-101 states:

System of Teacher and Specialist Certification--Student Teacher Exception (1) In order to establish a uniform system of quality education and to ensure the maintenance of professional standards, a system of teacher and specialist certification shall be established and maintained under the provisions of this title and no person shall be permitted to teach in the public schools of the state until he has obtained a teacher certificate or specialist certificate or the district has obtained an emergency authorization of employment from the state...

Section 20-4-102 states:

Board of Public Education Policies. To effect an orderly and uniform system of teacher and specialist certification, the Board of Public Education shall, upon the recommendation of the Superintendent of Public Instruction and in accordance with the provisions of this title, prescribe and adopt policies for the

issuance of teacher or specialist certificates. Such policy shall provide for:

(1) Reasonable training and experience requirements for teacher, specialist, supervisor, and administrative certificates and endorsements thereon as provided by the certification classification in 20-4-106;

(2) The renewal of teacher or specialist certificates based on the same conditions prescribed for the initial issuance of certificates;

(3) The conduct of hearings on teachers or specialists certification revocation, suspension or denial;

(4) The issuance of the emergency authorization to a district to employ a person who is not the holder of a valid teacher certificate as an instructor of pupils;

(5) Any other policy, not inconsistent with the law, which is necessary for the proper operation of a system of teacher and specialist certification. (emphasis supplied)

The Superintendent of Public Instruction's sole responsibility in certification is to administer the Board of Public Education policies and to make recommendations. See Section 20-4-103. The Superintendent must comply with the provisions and policies adopted by the Board of Public Education. The Superintendent cannot issue teacher certification or emergency authorization to any person who does not satisfy the qualifications and criteria established by the Board of Public Education in its policies for teacher certification, or determine teacher tenure protection without complying with the Standards for Accreditation of Montana Schools. Section 20-4-103 MCA.

Likewise, the Board of Trustees cannot exercise powers or confer upon individuals any status authority unless the law expressly or by necessary implication confers upon them such authority Abshire v. School District #1, 124 Mont. 224, 220 P.2d 1058 (1950).

Teaching certificates are linked to and are a major element of accreditation standards of public schools. Section 20-7-102. Meeting the accreditation standards adopted by the Board of Public Education is a basic requirement for all public schools in this state. This basic quality of education cannot be separated or ignored in determining a component of accreditation as in this case teaching staff. A significant portion of accreditation is a determination of proper teacher certification and assignment to assure the student, parent and the community of a well prepared and competent teacher and staff. See Standards for Accreditation of Montana Schools 3rd ed; 1976, p.1. The applicable Standards for Accreditation of Montana Schools adopted by

Board pursuant to the Administrative Rules of Montana clearly indicates teacher certification is limited to teachers in the classroom setting or one who provides instructional services. School psychologists are ancillary non-teaching personnel, not warranting or requiring certification. Montana Standards provide:

Teacher certification, as required by Montana statutes, serves a dual purpose. First, certification procedures seek to assure the student, parents and the community of well-prepared teachers. Second, certification standards contribute to the professional growth of teachers by requiring them to continue training through advanced study.

If students are to be able to compete in today's complex society, they must have access to a large body of knowledge and must be able to utilize sophisticated learning techniques. Accreditation standards require that high schools shall employ at least four certified teachers in addition to the principal and superintendent. The standards also require that teachers be assigned on the basis of certificate endorsements and college preparation.

The quality of classroom instruction also is determined by several other factors. To make the best use of a teacher's talents, release time is required to develop lesson plans, to engage in research and to participate in training sessions. The standards, recognizing this need, limit the teaching load for a teacher to 28 hours per week except for one- and two-teacher rural schools.

Qualifications of ancillary personnel--school nurses, social workers, speech therapist, and psychologist--are not outlined in the accreditation standards. It is expected, however, that such personnel be hired on the basis of professional training and experience and knowledge.

Differentiated staffing and other staffing procedures that involve the utilization of teaching personnel to make optimum use of their talents, interests and commitments are encouraged. Differentiated staffing can include utilizing classroom teachers at different levels of training and competency, subject matter specialists, special service personnel, community resource persons and paraprofessionals such as teacher interns and teacher aides. (emphasis supplied) Standards of Accreditation 3rd ed. 1976.

All parties in this appeal failed to define what a school psychologist does and is mandated to do under the Administrative Rules of Montana. The school psychologist is just one of several ancillary support personnel for special education programs

Section 10.16.1701 specifically requires a teaching certificate with an endorsement in special education prior to allowing any person

to teach in a special education program. Appellant from the record had neither

The role and responsibilities of a school psychologist are limited to providing a technical but necessary service, "...to administer, score and interpret individual tests of learning aptitude (I.Q.)..." Section 10.16.1104 ARM.

Further Section 10.16.1705 (3) states:

Persons satisfying these criteria will receive a letter of authority from the office of public instruction to administer, score, and interpret individual tests of learning aptitude and to participate on child study teams as a school psychologist. Their authority to test is contingent upon confining their services to students enrolled in districts in which they are providing services. In no way is this authority to be construed as licensure of psychologists or an endorsement for the private practice of psychology or for contracting directly with parents to test a child or children. This authorization to administer, score, and interpret individual tests will be valid for six years and renewed upon evidence of satisfactory performance. (History: Sec. 20-7-403, MCA; IMP, Secs. 20-7-403(2), 20-1-403 (7), MCA; NEW, 1917 MAR pp. 320-322, Eff. 8/26/77, ARM Pub. 11/26/77.)

School psychologists therefore were not certified as teachers under any capacity by the Board of Public Education nor have they even been recognized as teachers. School psychologists were provided approval by personnel of the Superintendent of Public Instruction pursuant to the initial development of special education in Montana, commencing in 1973 and 1974. See Section 10.16.1704 ARM. This approval of school psychologists had no enforcement responsibilities nor did approval or disapproval of a psychologist affect the accreditation standards of schools. Approval was maintained only to provide a basis or criteria upon which school districts could maintain competent individuals for special education programs. Similar approval was registered with other boards and agencies and professional organizations such as school nurses, and the Board of Nursing, speech therapists, and social workers

In 1981, the Board issued a "Class 6" certificate. Administrative Rules of Montana 10.57.501 (3) includes the certificate for school psychologists. Today a professional, serving as a school psychologist in the public schools, must be certified with a "spe-

cialist certificate." The 1981 Legislature reaffirmed its intent to disallow teacher status to a psychologist by adopting the "specialist certification" and limiting tenure status only to certified teachers.

### Tenure and Teacher

Teacher is defined by Section 20-1-101 (20) MCA as follows: Definitions. As used in this title, unless the context clearly indicates otherwise, the following definitions apply:

(20) "Teacher" means any person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, or administrative staff. This definition of a teacher shall also include any person for whom an emergency authorization of employment of such person has been issued under the provisions of 20-4-111. (emphasis supplied)

Appellant contends that the school district chose to employ Appellant as a teacher for each year from 1973. Written contracts were entered describing Appellant as a "teacher." Appellant further argues that in fact he was a certified teacher and registered his certificate with the county superintendent. The issue then becomes, does maintaining and registering a teaching certificate with the county superintendent create in the Appellant teacher status permitting tenure to apply?

Appellant contends:

1. Even though assigned as a school psychologist, he did maintain a teacher's certificate and a registered certificate with the county superintendent.
2. As a result of maintaining his teacher certification, although his exclusive responsibilities were in school psychology, that he should be granted tenure with the district.

An examination of the duties and responsibilities of Appellant is in order. Referring to the stipulation of facts #26 et seq. we find:

26. That in January, 1973, Appellant applied for the position of school psychologist with the Livingston School District;
27. That in 1973 the Livingston School District was granted an emergency authorization to employ Appellant as school psychologist. The Appellant began the 1973-1974 school year as the school psychologist (see respondents exhibit 1);

28. That Appellant commenced work in 1973 under the title "school psychologist," from that date has taken the label "school psychologist" (See respondents exhibits 10-12);
29. That Appellant was labeled elementary counselor on the 1974 report filed with the Office of Public Instruction, (Then Superintendent of Public Instruction). From that time on, with the exception of the 1976-77 school year, Appellant was listed as "school psychologist." (See Appellant's exhibit #E, 1 through E8 which Respondent adopts as Respondent's exhibits 2 through 9);
30. That Appellant was nominated and appointed as school psychologist and director of special education for Livingston School District 1 & 4 March 11, 1975 Board of Trustees meeting. (See respondent's exhibit #14.) On August 19, 1981, the Board of Trustees rescinded the nomination of Appellant for director of special education but left him as school psychologist. (See respondent's exhibit 15);
32. That on April 15, 1981, the Board of Trustees for the Livingston School District voted unanimously to terminate the services of Appellant as school psychologist;
34. That the Office of Public Instruction has recognized Appellant as a school psychologist and continued correspondence as evidence by exhibits L, M, N, O.

Appellant was never a teacher. He maintained certification which is not at the levels or in the areas of his employment and for areas which he was not responsible for. Appellant did not maintain emergency authorization of employment as prescribed by the Board of Public Education as has been argued by Appellant. A conditional approval was obtained by the district from the Office of Public Instruction to allow the services to be performed as a school psychologist.

The Board of Trustees retains the right to assign Appellant for whatever duties and responsibilities of employment are needed by the district. The Board chose to assign Appellant to the position of psychologist and reported such assignment to the Office of Public Instruction on the Annual Fall Reports for Accreditation Review.

A teacher shall be assigned at the levels and in the subject for which their certificate is endorsed. Standard 220 Standards of Accreditation.

A non-teaching school employee, like a certificated school employee, does not obtain continuous contract status during his period of employment under a limited contract voluntarily entered into where eligibility for such status did

not exist at the outset of the period covered by the limited contract. Shankle v. Board of Education of Ontario Local School, 54 Ohio App.2d 41, 374 N.E. 2d 648 (1977).

Further, in Champion v. Shoreline School District #42 of King County, 81 Wash. 2d 672, 504 P2d 304 (1972) a school nurse argued that a Washington statute which identified an employee of a school district as a teacher, principal, supervisor or other certificated employee was broad enough to include persons holding a certificate of any kind which are required by the State Board of Education and is not limited to persons holding teaching certificates. The Washington Supreme Court, after an exhaustive review of the statutes and applying the doctrine of "pari materia" and the intent of the legislature, concluded that the nurse was not a certificated employee, but concluded that protections afforded to teachers were extended only to teachers holding valid teacher certificates and performing teacher functions and not to other professions

Merely maintaining or registering teacher certificates does not create tenure status in the Appellant. Appellant was listed on the annual reports of accreditation to the Office of Public Instruction as a school psychologist. Minutes of the Board of Trustees indicate that Appellant was nominated and appointed as school psychologist and director of special education of the Livingston School District #1 and 4 on March 11, 1975. Appellant was not teaching. The position's duties and responsibilities flowed from the special education provisions for psychologists. The school psychologist was a technical ancillary professional who administered tests and evaluated students and reports and worked with teachers and administrators pursuant to his findings. He was not governed by Standard 201, et seq.

#### Contract

Appellant further claims that the contract language clearly evidences the status of teacher and by entering into more than three consecutive contracts he gained tenure.

The contract entered into by Appellant and the Board reads in part:

This agreement, made and entered into this 8th day of August 1980

between Livingston School District #1 & 4, Park County, Montana hereinafter referred to as the School District, and William G. Harris hereinafter referred to as the teacher, witnesseth:

- (1) That said school district hereby agrees to employ the said teacher to teach, within his or her areas of certificate endorsement, or to render related professional services, as and where assigned by the board of trustees of the Livingston Public Schools for the school year 1980-1981, for a period of 187 teaching days, including pupil instruction-related days (exclusive of legal holidays and vacations).
- (4) It is understood that the teacher holds a valid certificate, or will have met the requirements for such by the opening of school. A copy of said certificate showing registration with the Park County Superintendent of Schools shall be filed with the Clerk of the Board of the School District along with an official transcript of all...
- (5) In the absence of any previous notice of election or reelection this instrument shall operate as notice of election. Both parties shall comply with the provisions of the applicable state laws, terms and conditions of the negotiated agreement and with the adopted policies of the board of trustees (copies of the agreement and policies have been made available to the teacher? which are made a part of this contract by reference. Request to cancel this contract prior to the opening of school will not be granted when made after July 1, unless specifically approved by the board of trustees. (emphasis supplied)

The contract by its own terms is supplemented with Montana School Law. Both parties failed to follow Montana School Law to determine the content of the contract. Section 20-3-324 states: Powers and duties.

As prescribed elsewhere in this title, the trustees of each district shall have the power and it shall be their duty to perform the following duties or acts:

- (1) employ or dismiss a teacher, principal, or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board may deem necessary, accepting, or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of Title 20, chapter 4;

- (2) employ and dismiss administrative personnel, clerks, secretaries, teacher aides, custodians, maintenance personnel, school bus drivers, food service personnel, nurses, and any other personnel deemed necessary to carry out the various services of the district;

Section 39-2-101 Employment Defined. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

Section 39-2-404 Employee Must Obey Employer. Employee must substantially comply with all the directions of his employer concerning the service in which he is engaged, except where such obedience **is** impossible or unlawful or would impose new and unreasonable burdens on the employee.

Section 39-2-405 Employee Must Conform to Usage. An employee must perform his service in conformity to the usage to the place of performance unless otherwise directed by his employer unless **it** is impracticable or manifestly injurious to his employee to do so.

Section 39-31-303 Management Rights of Public Employees. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

- (1) direct employees;
- (2) hire, promote, transfer, assign, and retain employees;
- (5) determine the methods, means, job classification, and personnel by which government operations are to be conducted;
- (7) establish the methods and processes by which work is performed.

The teacher's contract must be read within the context of all the stipulated facts and Montana Law as incorporated and made a part of the contract by reference. The contract addresses rendering of related professional service. A school district may call an employee by whatever term they choose in their contract. However, under law and the Administrative Rules promulgated by the Board of Public Education, an individual is a teacher only if that person meets certain criteria in rendering or performing the functions that he or she was hired to perform in his or her contracted capacity.

1. Here appellant failed to meet those criteria. ~~He~~ did not perform teaching functions. ~~He~~ was a school psychologist rendering related professional services.
2. Appellant was not assigned to a position for which he was certified by the Board of Public Education.
3. The management rights retained by the Board of Trustees of the particular school district allowed **it** to assign and retain the employee for the specific purposes in which they needed him and he was to comply with the directions of the Board.

4. From the stipulated facts it is abundantly clear that Appellant was hired on a year-to-year basis to render professional services as a school psychologist.

5. The letter of conditional approval from the Office of Public Instruction permitted Appellant to perform these related professional services within the context of special education.

6. Appellant was termed a school psychologist in the annual report submitted to the Office of Public Instruction which did not require registration of his certificate with the county superintendent because he did not perform or was not assigned those teaching positions from the Board of Trustees.

7. The 1981 Legislature made it clear that the role of the specialist was not the role of a teacher.

8. Teacher tenure laws have been recognized for those individuals who actually perform the important role of teaching. In essence tenure protection lies with the teaching profession; it cannot be treated lightly or allowed to be weakened by other school-related services.

The contract used by respondents is similar to contracts used in dozens, if not hundreds, of locations throughout the state. The contract is all encompassing, used to cover all professional employees of the school district including speech therapists, nurses and psychologists. This was a measure designed to save time and money by the Board of Trustees in securing employment agreements. The contract, although not the best example that can be provided in this instance, must be read within the context of all the facts and in compliance with state law and regulations. Appellant is not a certified teacher for the services performed at Livingston School District nor is any other employee who served in an ancillary, nonteaching, or support staff capacity.

#### Teacher Retirement System

Finally, Appellant contends that as evidence of his status as a tenure teacher the school district annually contributed to Appellant's account in the Montana Teachers' Retirement Fund as set forth in Section 19-4-101 et seq.

The criteria established for eligibility in the Teachers' Retirement Fund is found in Section 19-4-302. Further, active membership

has been changed and the statute has been amended several times in previous years. According to the stipulated facts Appellant was a teacher in another district prior to applying for the school psychologist position in Livingston. At that time it was mandatory for a teacher of a school district to participate as an active member in the Teachers' Retirement System. The determination of continuation of membership with the Teachers' Retirement System and the administration of the system is the responsibility of the Teachers' Retirement System Board.

The Teachers' Retirement System has expanded its membership to include other ancillary non-teaching personnel. Examples of expanded membership may be found in Section 19-4-101 (20) in the definition of service. Service means the performance of such instructional duties or related activities as would entitle the person to active membership in the Retirement System under the provisions of Section 19-4-302. Section 2.4.302 ARM, permits school nurses to be members of the Teachers' Retirement System. Appellant's argument that being a member of the Teachers' Retirement System insures or provides credible evidence that he maintains tenured status is not sound. The Retirement System and tenure status are not congruent. The intent of the Legislature in the governance of the Teachers' Retirement System and tenured protection addresses different purposes. The appropriate eligibility of Appellant in the Teachers' Retirement System as a school psychologist is beyond the jurisdiction of the State Superintendent and shall not be addressed any further.

Affirmed.

DATED June 7, 1982.